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JONATHAN WAYNE BOTTEN, SR.,

TANJA DUDEK-BOTTEN, ANNABELLE BOTTEN,

AND J.B.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN WAYNE BOTTEN, SR.;  
TANJA DUDEK-BOTTEN;  
ANNABELLE BOTTEN; and J.B., a  
minor, by and through his guardian  
JONATHAN WAYNE BOTTEN, SR.,

Plaintiffs,

vs.

STATE OF CALIFORNIA; COUNTY  
OF SAN BERNARDINO; ISIAH  
KEE; MICHAEL BLACKWOOD;  
BERNARDO RUBALCAVA;  
ROBERT VACCARI; JAKE ADAMS;  
and DOES 1-10, inclusive,

Defendants.

Case No. 5:23-cv-00257-KK-SHK

[Consolidated for purposes of discovery  
with *Botten, et al. v. State of California,*  
*et al.*, Case No. 5:23-cv-00257-KK-  
SHK]

*Honorable Kenly Kiya Kato  
Mag. Judge Shashi H. Kewalramani*

**PLAINTIFFS' EX PARTE  
APPLICATION FOR LEAVE TO  
FILE A CONSOLIDATED  
OPPOSITION TO DEFENDANTS'  
MOTIONS FOR SUMMARY  
JUDGMENT, CURRENTLY DUE  
FEBRUARY 27, 2025, THAT  
EXCEEDS THE WORD COUNT  
LIMIT PURSUANT TO LOCAL  
RULE 11-6.1**

**TO THIS HONORABLE COURT AND ALL PARTIES AND THEIR  
COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that Plaintiffs Jonathan Wayne Botten, Sr., Tanja Dudek-Botten, Annabelle Botten, and J.B., a minor by and through his guardian *ad litem* Jonathan Wayne Botten, Sr. (“Plaintiffs”) hereby move by way of this Ex Parte Application for a leave to file a Consolidated Opposition to County Defendants’ Motion for Summary Judgment, or in the Alternative Summary Adjudication (Doc. No. 84) and State Defendants’ Motion for Summary Judgment (Doc. Nos. 86, 87) that exceeds the 7,000 word count limit under Local Rule 11-6.1. Plaintiffs seek to file an outsize consolidated brief of no more than **12,000** words.

Plaintiffs make this application pursuant to Central District Local Rule 7-19. The grounds for this application are set forth in the Memorandum of Points and Authorities, which follows below, and the Declaration of Hang D. Le, which is submitted concurrently herewith. Prior to filing this Ex Parte Application, Plaintiffs’ counsel contacted Defendants State of California, by and through the California Highway Patrol, Michael Blackwood, Isaiah Kee, Bernardo Rubalcava’s (“State Defendants”) counsel and County of San Bernardino, Robert Vaccari, and Jake Adams’ (“County Defendants”) counsel in compliance with Local Rule 7-19 through 7-19.1. State Defendants and County Defendants’ counsel are:

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***Attorneys for Defendants State of California, by and through the California  
Highway Patrol, Blackwood, Kee, and Rubalcava***

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In the early morning hours of February 17, 2021, near the area of Peach  
4 Avenue and Catalpa Street in Hesperia, California, Defendants California High Patrol  
5 Officers Isaiah Kee, Michael Blackwood, and Bernardo Rubalcava (“Officer  
6 Defendants”) and County of San Bernardino Sheriff’s Deputies Robert Vaccari and  
7 Jake Adams (“Deputy Defendants”) used excessive force and were negligent in their  
8 conduct when detained Hector Puga and ultimately discharged their firearms at Mr.  
9 Puga and in the direction of the Botten Residence, killing Mr. Puga and seriously  
10 injuring Jonathan Wayne Botten, Sr., Tanja Dudek-Botten, and J.B.

11 Plaintiffs Wayne Botten, Sr., Tanja Dudek-Botten, J.B., and Annabelle Botten  
12 (“Plaintiffs”) filed this action on February 16, 2023, against Defendants State of  
13 California and Officer Defendants (together “State Defendants”), County of San  
14 Bernardino and Deputy Defendants (together “County Defendants”) (collectively  
15 “Defendants”), alleging federal claims of excessive force under the Fourth  
16 Amendment and violation of substantive due process under the Fourteenth  
17 Amendment pursuant to 42 U.S.C. § 1983 and state law claims of battery, negligence,  
18 negligent infliction of emotional distress, and violation of the Bane Act.<sup>1</sup>

19 On January 30, 2025, County Defendants filed their Notice of Motion and  
20 Motion for Summary Judgment, or in the Alternative Summary Adjudication  
21 (“County Defendants’ MSJ”). The hearing for County Defendants’ MSJ is set for  
22 March 20, 2025. (Doc. No. 84). In County Defendants’ MSJ, County Defendants  
23 argue that Plaintiffs do not have sufficient evidence to support their negligence and  
24

25 <sup>1</sup> Prior to Defendants’ filing of their respective Motions for Summary Judgments, the  
26 parties met and conferred about the issues in Defendants’ respective Motions.  
27 Plaintiffs agreed to dismiss Plaintiffs’ Fourth Amendment excessive force claim,  
28 Fourteenth Amendment substantive due process claim, battery claim, and Bane Act  
claims against Defendants Jake Adams, Robert Vaccari, and Michael Blackwood.

1 negligent infliction of emotional distress claims, that the Deputy Defendants did not  
2 owe a duty to the Bottens, that the actions of the Officer Defendants were a  
3 superseding cause of the Bottens' injuries, that the California discretionary immunity  
4 applies to Plaintiffs' negligence and NIED claims, and that Plaintiffs failed to  
5 substantially comply with the Government Tort Claims act with regards to Plaintiffs'  
6 Negligence and NIED claims. (*See* Doc. No. 84).

7       On January 30, 2025, State Defendants filed their Notice of Motion and Motion  
8 for Summary Judgment ("State Defendants' MSJ"). (Doc. No. 86). Later that day,  
9 State Defendants filed their Memorandum of Points and Authorities in support of  
10 their Motion. The hearing for State Defendants' MSJ is set for March 20, 2025. (Doc.  
11 No. 87). State Defendants' MSJ argues that there was no seizure under the Fourth  
12 Amendment, that Kee and Rubalcava did not use excessive force, that Plaintiffs do  
13 not have a viable Fourteenth Amendment claim, that Plaintiffs' battery claim fails  
14 because the officers' use of force was reasonable, that the officers were not negligent,  
15 that Kee and Rubalcava are entitled to qualified immunity, and that Officer  
16 Defendants are immune from state law liability because their use of force was  
17 privileged. (*See* Doc. Nos. 86, 87).

18       Pursuant to Local Rule 7-9, Plaintiffs' Oppositions to County Defendants' MSJ  
19 and State Defendants' MSJ is due February 27, 2025, 21 days before the March 20,  
20 2025 hearing. On February 18, 2025, Plaintiffs' counsel e-mailed County Defendants'  
21 counsel and State Defendants' counsel requesting a stipulation for leave to allow  
22 Plaintiffs to file a Consolidated Opposition with a word count limit of 14,000 words.  
23 (Le Decl., ¶ 3). State Defendants' counsel indicated that State Defendants were  
24 agreeable to the proposed stipulation. (*Id.*). County Defendants' counsel indicated that  
25 County Defendants would only be agreeable to a Consolidated Opposition of a word  
26 count limit of 10,000 words or a higher word count limit in exchange for a reciprocal  
27 increase to the word count limit for County Defendants' Reply. (*Id.*). Plaintiffs'  
28 counsel replied indicating that Plaintiffs' counsel could not foresee the Consolidated

1 Opposition being under 10,000 words, given the many separate and distinct  
2 arguments made by County Defendants and State Defendants and thus proposed a  
3 compromise of 12,000 words for Plaintiffs' Consolidated Opposition. (*Id.*). County  
4 Defendants' counsel replied and indicated that County Defendants would be willing  
5 to agree to a 12,000-word count limit for Plaintiffs' Consolidated Opposition only if  
6 Plaintiffs agreed to allow County Defendants a 10,000-word count limit for their  
7 Reply. (*Id.*). Given that County Defendants lacked good cause for an increase in their  
8 word count limit for their Reply, Plaintiffs declined and now bring this Ex Parte  
9 Application.

## 10 **II. EX PARTE BASIS FOR RELIEF**

11 The granting of *ex parte* relief requires an evidentiary showing of good cause  
12 that: (1) "the moving party's cause will be irreparably prejudiced if the underlying  
13 motion is heard according to regular noticed motion procedures;" and (2) "the moving  
14 party is without fault in creating the crisis that requires *ex parte* relief, or that the  
15 crisis occurred as a result of excusable neglect." *See Mission Power Eng'g Co. v.*  
16 *Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal. 1995); *see, e.g., Azam v.*  
17 *Brown*, 714 F. App'x 663, 665 (9th Cir. 2017) (recognizing *Mission Power* as setting  
18 forth standard for *ex parte* relief).

19 Here, Plaintiffs' ability to litigate this case will be irreparably prejudiced if the  
20 underlying motion is heard according to regularly noticed motion procedures because  
21 the deadline for Plaintiffs to file their opposition(s) to County Defendants' MSJ and  
22 State Defendants' MSJ is February 27, 2025. Additionally, Plaintiffs are without fault  
23 in causing this *ex parte* crisis as Plaintiffs did not know in advance the number of  
24 distinct arguments between State Defendants and County Defendants would make in  
25 their respective MSJs and the standard motion briefing schedule requires that any  
26 opposition be filed 21 days before the scheduled hearing and thus, Plaintiffs could not  
27 have brought a regularly-noticed motion to seek leave to file a Consolidated  
28 Opposition that exceeds the 7,000 word limit under LR 11-6.1



1 **III. GOOD CAUSE EXISTS FOR LEAVE TO ALLOW PLAINTIFFS TO**  
2 **FILE A CONSOLIDATED OPPOSITION TO DEFENDANTS'**  
3 **MOTIONS FOR SUMMARY JUDGMENT THAT EXCEED THE LR 11-**  
4 **6.1 WORD COUNT LIMIT**

5 Under the Local Rules, Plaintiffs are entitled to file two separate Oppositions to  
6 each respective Motion for Summary Judgment. Under Local Rule 11-6.1, each  
7 Opposition brief must not exceed 7,000 words. Thus, Plaintiffs would be entitled to a  
8 total word count of 14,000 between the two Oppositions. However, because County  
9 Defendants' MSJ and State Defendants' MSJ both arise out of the same incident and  
10 address claims that arise out of the same nucleus of facts, Plaintiffs contend that it  
11 would be more efficient for Plaintiffs to file a Consolidated Opposition to both  
12 Motions for Summary Judgment. Plaintiffs will be relying on the same set of facts for  
13 both Oppositions and similar arguments for Plaintiffs' negligence and NIED claims.

14 However, because County Defendants and State Defendants also bring separate  
15 and distinct arguments in their respective MSJs, there is a foreseeable need for  
16 Plaintiffs to exceed the 7,000-word count in their Consolidated Opposition. Plaintiffs'  
17 Consolidated Opposition must address State Defendants' arguments regarding  
18 whether the Bottens were seized under the Fourth Amendment, whether Sergeant Kee  
19 and Officer Rubalcava used excessive force, whether Sergeant Kee and Officer  
20 Rubalcava violated Plaintiffs' Fourteenth Amendment substantive due process right,  
21 whether Sergeant Kee and Officer Rubalcava committed a battery against Plaintiffs,  
22 whether Sergeant Kee and Officer Rubalcava are entitled to qualified immunity, and  
23 whether the Officer Defendants are immune from state law liability because their  
24 conduct and use of force was privileged under California Penal Code, sections 835a  
25 and 196. Plaintiffs must also address County Defendants' arguments regarding the  
26 sufficiency of Plaintiffs' evidence, whether the County Deputies' conduct was a  
27 proximate cause of Plaintiffs' injuries, whether the California discretionary immunity  
28 applies, and whether Plaintiffs substantially complied with the Government Tort  
Claims act with respect to Plaintiffs' negligence and NIED claim. Thus, in order to

1 file a Consolidated Opposition that sufficiently addresses the overlapping facts and  
2 Defendants' general negligence argument while also addressing the numerous  
3 separate and distinct argument made by County Defendants and State Defendants,  
4 Plaintiffs contend that there is good cause for leave to allow Plaintiffs to file a  
5 Consolidated Complaint to Defendants' Motions for Summary Judgment with a word  
6 count that does not exceed **12,000** words, including headings, footnotes, and  
7 quotations but excluding the caption, the table of contents, the table of authorities, the  
8 signature block, the certification required by L.R. 11-6.2, and any indices and  
9 exhibits.

10 It is anticipated that County Defendants will argue that County Defendants  
11 should receive a reciprocal increase in their word count limit. However, County  
12 Defendants lack good cause for a word count increase for their Reply. First, County  
13 Defendants were willing to grant Plaintiffs a word count limit of 10,000 words but  
14 when Plaintiffs sought an additional 2,000 words, County Defendants countered with  
15 an additional 3,000 words for County Defendants' Reply, with no reason for the  
16 increase. Second, Plaintiffs' request for an increase in the word count limit is based  
17 on the fact that Plaintiff is addressing two separate Motions for Summary Judgment in  
18 Plaintiffs' Consolidated Opposition, and that much of the legal arguments made by  
19 County Defendants and State Defendants do not overlap. Thus, Plaintiffs require an  
20 increase in the word count to address the numerous legal arguments between the two  
21 Motions. County Defendants do not have to address the legal arguments Plaintiffs  
22 make in response to State Defendants' arguments. In fact, while Plaintiffs maintain  
23 five separate causes of actions, only two—negligence and NIED—apply to County  
24 Defendants.

25 Accordingly, there is good cause for leave to allow Plaintiffs to file a  
26 Consolidated Opposition to Defendants' Motions for Summary Judgment with a word  
27 count limit increase of **12,000** words, including headings, footnotes, and quotations  
28 but excluding the caption, the table of contents, the table of authorities, the signature



1 block, the certification required by L.R. 11-6.2, and any indices and exhibits, without  
2 granting any reciprocal increase to the word count limit for County Defendants'  
3 Reply.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Plaintiffs respectfully request that the Court grant  
6 Plaintiffs leave to file a Consolidated Opposition to Defendants' Motions for  
7 Summary Judgment with a word count limit of no more than **12,000** words, including  
8 headings, footnotes, and quotations but excluding the caption, the table of contents,  
9 the table of authorities, the signature block, the certification required by L.R. 11-6.2,  
10 and any indices and exhibits.

11  
12 DATED: February 20, 2025

LAW OFFICES OF DALE K. GALIPO

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14 Bv /s/ *Hang D. Le*  
15 Dale K. Galipo  
16 Hang D. Le  
17 Attorneys for Plaintiffs  
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